In the
Supreme Court of the United States

OCTOBER TERM, 1961

No. 425

WILLIAM H. "BILL" CROSS, FLOYD L. CULLINS, LYMAN GAGE REYNOLDS, ALDEEN CARSWELL and AMOS HARRIS, JR.,

Appellants,

vs.

STATE OF FLORIDA,

Appellee

REPLY TO RESPONSE TO QUESTION THREE

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TABLE OF CONTENTS

	Page
Reply to Response Question Three	1
Conclusion	6
Proof of Service	6

TABLE OF CITATIONS

CASES

Chapman vs. U. S., 5 L. Ed. 828, 365, U. S. 610, 81 S. Ct. 776	2
Silverman vs. U. S., 5 L. Ed (2d) 743, 81 S. Ct. 679, 275 F 2d 173	1, 2

UNITED STATES CONSTITUTION

Fourth Amendment	6
Fifth Amendment	6
Fourteenth Amendment	6

UNITED STATES SUPREME COURT RULES

Rule 16. (b)	1

FEDERAL COMMUNICATIONS ACT

605	6

FLORIDA CONSTITUTION

Declaration of Rights, Sections 12 and 22	6

FLORIDA STATUTES

Section 822.10	6

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REPLY TO RESPONSE QUESTION THREE

Appellants submit Appellee, in its Response to Question Three, fails to come under any of the grounds for dismissal as prescribed by Rule 16.(b) of the Rules of the Supreme Court of the United States.

Appellee, (p. 4 of Response to Question Three), seeks to distinguish the case of Silverman v. U. S., 5 L. Ed (2d) 743,

81 S. Ct. 679, 275 F 2d 173, factually, with the case under consideration. Appellants contend the facts are so similar the rule announced in the Silverman case applies.

The air shaft had the feature of privacy. If this were not true why was it necessary, in order to pick up sounds from Apartment 607, to enter into and utilize Apartment 707 and the shaft leading therefrom? The shaft wherever it ran was for tenants only. No tenant in the absence of evidence to the contrary, nor even the landlord, could admit another to the privacy of an apartment. In the recent case of Chapman v. U. S., 5 L. Ed. 828, 365 U. S. 610, 81 S. Ct. 776, it was held that even a landlord could not authorize the entry of officers to make a search and seizure of premises. Certainly a neighbor tenant could not authorize such.

The vents in the apartments were part and parcel of each apartment. They were individual as such. These vents are the most relevant of all the facts. It was through its existence and use, together with the electronic device, that constitutional guarantees were violated.

The listening device was lowered 93 inches to the vent of Apartment 607. The evidence does not reveal that any sounds could have been, or were picked up, from any place other than 607. The Court commented, (Vol II, p. 547), there was no testimony it could not pick up sounds from another source. It is obvious the comments overheard definitely came from Apartment 607 because the officer who signed the affidavit for search warrant so asserted. Had the shaft or vent been so common as a hall way, it would have been impossible to determine from which the sounds came.

It is not deemed necessary to reply to the comments relative

to the Shoreham Hotel or that pertaining to fire escapes. These are not pertinent to the pending question.

The following pertinent quotes are made of the evidence, all of which relate to the pending question, to-wit:

Vol. I, p. 293:

"Q What did you do?

A With the assistance of Special Agent Smilgin I located an air shaft.

Q You can use this diagram here if you wish. At the time you went to Apartment 707 on October 17, 1958, did you take any equipment with you?

A Yes, sir.

Q What?

A A Magnecord recording device and miscellaneous tools and wires and a battery and a carbon microphone. I believe that's all.

Q What did you do with that equipment in 707?

A This is the living room of the apartment and this is the kitchinette area and this location approximately five feet from the floor is an opening to an air shaft and I removed the grille from that air shaft and dropped a wire with a"

Vol I, p. 294:

"microphone on it down the air shaft ninety-three inches and attached this wire -- the opposite end from the microphone and recording device in such a way it would receive sounds."

Vol I, p. 295:

"Q Now, I believe you said you attached a microphone?

A Yes.

Q What was the length of the cord? How far down the shaft was it?

A Ninety-three inches from the bottom edge of the grating that I opened.

Q That was in Apartment 707?

A Yes, sir.

Q In other words, from the head of the microphone in the air shaft it was ninety-three inches?

A Yes.

Q For what purpose was it lowered ninety-three inches?

A I arrived at the ninety-three inches dimension because of measurements I made in 707. I measured from the ceiling of 707 to the top edge of the grat-

ing and measured the width of the grating and the bottom of the grating to the floor and measured twelve inches for the thickness of the floor.

Q Then in what position was the microphone after being lowered ninety-three inches as you testified?

A Opposite the air shaft in Apartment 607.

Q In other words, after putting the microphone on the wire and dropping it ninety-three inches, it was in front of the same grating in front of 607? In the apartment immediately below?

In front of the grating in Apartment 607 immediately"

Vol I, p. 296:

"below?

A Yes, sir.

Q Could you hear sounds emanating from 607 on that microphone as installed by you?

A Yes, I could hear sounds emanating from that microphone to indicate it was live."

to which objection was made, (p. 568, 569):

"COURT: The proffered testimony here of this witness concerning what he heard over the earphones.

MR. MYERSON: The defendants object and move to strike all the testimony of the witness Smilgin relative to anything he may have heard over any mechanical device, whether it was a microphone or tape recorder, for the following reasons: One, it is in violation of Section 12 and 22 of the Declaration of Rights of the State Constitution; two, it is in violation of the fourth and fifth amendments in the Federal Constitution; three, in violation of 605 of the Federal Communications Act; four, it is in violation of Section 822.10 of the Florida Statutes, that the use of the mechanical device whether a microphone or tape recorder -- that the witness has projected himself into the privacy of Defendant Cross' room and it was a violation of privacy."

CONCLUSION

It is re-submitted and urged the use of the electronic device to obtain evidence used as a basis for procurement of a search warrant violated the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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I hereby certify that six copies of ~~the~~ the foregoing ~~Jurisdictional Statement~~ were furnished to Honorable Richard W. Ervin, Attorney General of the State of Florida, by U. S. Mail on the 10th day of January, 1962.